72-652

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In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-652

ESTATE OF HARRY A. HAVERLAH, DECEASED
HARRY L. BROWN, EXECUTOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on July 27, 1972.

OPINIONS BELOW

The opinion of the District Court (Appendix A, *infra*, pp. 1-20) is officially reported at 327 F. Supp. 243. The opinion of the Court of Appeals (Appendix B, *infra*, pp. 1-19) is not yet officially reported, but it is unofficially reported at 72-2 U.S.T.C. ¶ 12,871.

JURISDICTION

The judgment of the Court of Appeals was entered on July 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the value of Harry A. Haverlah's bequest to charity was not "presently ascertainable" at the date of his death.

STATUTE INVOLVED

The pertinent statutory provision as it read at the time of Haverlah's death is 26 U.S.C., Section 2055 (a)(2) as follows:

> SEC. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.
>
> (a) In General.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—
>
> (2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement

> of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

This section of the Internal Revenue Code of 1954 was amended by P.L. 91-172, effective for years beginning after December 31, 1969.

STATEMENT

This is a civil case; a suit for refund of estate taxes instituted in the District Court pursuant to 28 U.S.C. Section 1346(a) by the Estate of Harry A. Haverlah, Deceased, Harry L. Brown, Executor. The District Court ruled in favor of the taxpayer, the Petitioner herein. From that judgment the government appealed and the Court of Appeals for the Fifth Circuit reversed and remanded, holding that the estate tax deduction claimed was not allowable because the value of the interest which passed to charity was not "presently ascertainable" at the date of Haverlah's death.

The case was submitted to the District Court on the pleadings, a joint stipulation of facts, the evidence adduced at trial, and briefs. The crucial facts of the case are that Harry A. Haverlah, a resident of Palestine, Texas, died in December, 1964, leaving a will (Appendix C, *infra*, pp. 1-21) naming Harry L. Brown Executor and Trustee of his estate. After making

certain provisions for nonchartiable beneficiaries, Haverlah left the remainder of his estate for the establishment and maintenance of the Harry A. Haverlah Foundation, the principal purpose of which is the making of educational loans to deserving high school graduates.

During his lifetime, Haverlah was instrumental in the organization and growth of H. L. Brown & Associates, Inc., a factoring business located in Palestine, Texas. At the time of his death, Haverlah owned 49% of the stock of the corporation, with the remainder being owned by Harry L. Brown. Haverlah had great confidence in the future of H. L. Brown & Associates, both as to its profitability and as to the expected increase in value of his stock interest therein. In order that H. L. Brown & Associates be encouraged to succeed and expand to the end that the trust, and the purpose for which it was created, would ultimately benefit, Haverlah, in his will, authorized the Trustee to make all or any part of his estate available to the corporation. The assets could be used as collateral for securing loans to the corporation and/or the Trustee could make direct loans to the corporation. At the time of his death, Haverlah owned shares of stock in the Franklin Life Insurance Company which was quite valuable and which stock stood as collateral for corporate loans totalling $450,000. However, it is unchallenged that their existed no real possibility that the Franklin Life

stock would be needed to satisfy the corporate obligation which it secured.

It is emphasized that it is the foregoing authority of the Trustee to use the trust assets in connection with the business operations of H. L. Brown & Associates, which is the entire reason why the Court of Appeals reversed the District Court's holding that the value of the charitable interest was presently ascertainable at the date of Haverlah's death. Accordingly, the Court intimated no opinion as to the effect of the other invasionary powers, which were limited by ascertainable standards, upon the deductibility of the charitable remainder. In fact, the Court below did not disagree with the remoteness of the possible inefficacy of the charitable transfer, but rather, based on its analysis of three Supreme Court decisions, the Court determined that the bequest to the Haverlah Foundation was not presently ascertainable.

REASONS FOR GRANTING THE WRIT

The Court below has misconstrued the Supreme Court's teachings, as to when a charitable interest is "presently ascertainable", in *Ithaca Trust Co. v. United States*, (1928), 279 U.S. 151, 49 S. Ct. 291, 73 L. Ed. 647; *Merchants National Bank v. Commissioner* (1943), 320 U.S. 256, 64 S. Ct. 108, 88 L. Ed. 35, and *Henslee v. Union Planters National Bank & Trust Co.* (1949), 335 U.S. 595, 69 S. Ct. 290, 93 L. Ed. 259. The invasion-

ary powers found in those cases do not remotely resemble the so-called invasionary power found to be fatal to the charitable deduction in the instant case. In fact, the Trustee's authority questioned in the instant case by the Court of Appeals is not even properly classified as an "invasionary" power. It is simply the Testator's directions to his Trustee as to the highest and best use which could be made of his trust assets for the benefit of the trust beneficiaries, the principal one of which was charity.

In the three cited Supreme Court cases, the Trustee was given the authority to invade the corpus of the trust for the lifetime beneficiaries but only in *Ithaca Trust Co. v. United States, supra*, was the power to invade found to be sufficiently subject to an ascertainable standard so as to permit the charitable deduction. There, the Trustee could invade the principal in any amount "that may be necessary to suitably maintain [the decedent's wife] in as much comfort as she now enjoys."

On the other hand, in *Merchants National Bank v. Commissioner, supra*, and *Henslee v. Union Planters National Bank & Trust Co., supra*, the Trustees could invade principal for the "happiness" of the beneficiary in the first case and for the "pleasure" of the beneficiary in the second case. It was manifest that the use of the terms "happiness" and "pleasure" in those two instances gave the Trustee unlimited invasionary powers for the benefit of the noncharitable beneficiary.

The Court of Appeals his misplaced its reliance on the three above-cited cases in two very important ways. First, the Trustee's authority here in question was not an invasionary power at all. It was an investment power. Secondly, in granting the said power to the Trustee, he was not intending to expose his estate to diminution in favor of noncharitable beneficiaries, but on the contrary, he sincerely and legitimately believed that such use of the trust assets would benefit the trust estate greatly and, in the end, benefit charity. In this connection, Mr. Justice Holmes' observation in the *Ithaca Trust Co.* case that "There was no uncertainty appreciably greater than the general uncertainty that attends human affairs" 279 U.S. at 154, is singularly appropriate in the instant case. At the date of Haverlah's death, the interest which passed to charity was "presently ascertainable."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

It is hereby certified that service of three copies of this Petition for Writ of Certiorari has been made on the Solicitor General, Department of Justice, Washington, D.C. 20530, by Air Mail, in accordance with the rules of the Supreme Court of the United States.

Dated: day of October, 1972.

Allen E. Pye
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CIVIL ACTION NO. 5102

ESTATE OF HARRY A. HAVERLAH, DECEASED, HARRY L. BROWN, EXECUTOR,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT

1. Plaintiff HARRY L. BROWN is the duly qualified and acting Executor of the Estate of Harry A. Haverlah, who died December 4, 1964, testate, while a resident of Palestine, Anderson County, Texas.

2. On or about May 18, 1967, plaintiff filed an estate tax return for the Estate of Harry A. Haverlah with the District Director of Internal Revenue, Dallas, Texas.

3. On or about December 19, 1969, following audit of the estate tax return for the Estate of Harry A. Haverlah, a deficiency in estate tax in the amount of $122,692.78 was assessed, together with interest in the amount of $27,807.56, for a total of $150,500.34. The amount so assessed was paid by plaintiff on or about December 30, 1969.

4. Following assessment and payment of the foregoing amounts, plaintiff filed a claim for refund with the District Director of Internal Revenue, Dallas, Texas, which claim was denied by letter dated January 21, 1970.

5. On April 16, 1970, the Internal Revenue Service, by statutory notice of deficiency, proposed an additional deficiency in estate tax of $26,573.55 against plaintiff. On May 22, 1970, plaintiff paid such proposed deficiency together with interest thereon in the amount of $6,687.07.

6. Following timely assessment and payment of the deficiency referred to in paragraph 5, *supra*, plaintiff filed an amended claim for refund in which refund of such deficiency was sought, and thereafter, incorporated its amended claim for refund into this action by the filing of its First Amendment to the Complaint.

7. At the date of the decedent's death, he had a gross estate valued at $869,865.28 of which $770,013 consisted of capital stock of the Franklin Life Insurance Company. The remainder of his estate consisted of other stocks, including 147 shares of capital stock of H. L. Brown & Associates, Inc., real estate, cash, insurance and other miscellaneous property.

8. At the time of his death, the decedent was single, his wife having died approximately three months before his death.

9. Decedent left a Will, dated November 16, 1964, in which he named Harry L. Brown Independent Executor and Trustee, and the Trustee was empowered to make all or any part of decedent's estate available to H. L. Brown & Associates, Inc., a corporation of which Harry L. Brown was president (and until his death the plaintiff had been vice president), or any successor corporation of which Harry L. Brown was president, as collateral for loans to that corporation. Also, the Trustee was empowered to make direct loans of the decedent's estate to H. L. Brown & Associates, Inc., or a successor corporation as above described.

10. The Will further provided that if H. L. Brown & Associates, Inc. is given the use of all or any portion of the decendent's estate for purposes of collateral, that corporation was to pay fees to the estate in the manner set out in the Will. If direct loans are made to H. L. Brown & Associates, Inc., such loans must be made on the same or substantialy the same terms as those then in existence between H. L. Brown & Associates, Inc. and other lending institutions except that the loans did not have to be secured.

11. In paragraph V. D. of decedent's Will, it is provided that:

> "D. The Trustee is directed to pay over to Shirley Johnson, for and during her lifetime or until she shall marry, as the same are collected, all cash dividends paid on my Franklin Life Insurance Company stock.

"Further, the Trustee shall pay over to Shirley Johnson, for and during her lifetime or until she shall marry, as the same are collected, any and all fees paid to the Trustee by H. L. Brown & Associates, Inc. or any successor corporation for its use of any portion of the corpus of the trust estate as collateral; and in the event during any month no such fee is paid by H. L. Brown & Associates, Inc. or any successor corporation, or in the event during any month such fee is less than $450.00, the Trustee is directed to pay over to the said Shirley Johnson a sum of money equal to the difference between $450.00 and the fee actually paid to the Trustee by H. L. Brown & Associates, Inc. or any successor corporation. Such sum shall be paid first out of any undistributed income then in the hands of the Trustee, but if there be no undistributed income or if it be insufficient in amount to assure such regular monthly payment to Shirley Johnson of $450.00, then I authorize and direct the Trustee to pay such sum to the said Shirley Johnson out of the corpus of the trust estate.

"In addition to the other provisions of this subparagraph D hereof, for and during the lifetime of Shirley Johnson or until she shall marry, my Trustee is authorized, empowered and directed to pay out of any accumulated undistributed income of the trust estate, or if such undistributed income be insufficient therefor, the Trustee is authorized to sell the corpus of the trust estate to the extent necessary and to pay from the proceeds of such sale, all costs, expenses and charges for any unusual medical services and all costs and expenses for unusual care and maintenance, including but not limited to the fees and charges of doctors, surgeons, nurses, laboratory fees, hospitals and clinics, incurred by Shirley Johnson, or incurred by either Gary Johnson or Cliff Johnson at any time while the one of said boys incurring the same shall

be less than 21 years of age and in the legal custody of Shirley Johnson; and further, the Trustee is authorized, empowered and directed in behalf of the said Shirley Johnson to pay the reasonable costs and expenses of any unusual emergency of a character other than that related to health or medical care. With reference to this emergency provision for additional benefits for the said Shirley Johnson, the Trustee may in his sole discretion determine that the condition called to his attention by Shirley Johnson is unusual and of an emergency nature, in which case he shall forthwith make payments therefor as herein provided; but in the event the Trustee declines to deem such condition unusual or of an emergency nature when the same is called to his attention by the said Shirley Johnson, and the said Shirley Johnson believes the judgment of the Trustee thereon to be in error, then and in such event the determination of the matter as to whether or not such condition is 'unusual' or of an 'emergency' nature shall be made by the Board of Directors of H. L. Brown & Associates, Inc. or any sucessor corporation, to the end that a decision thereon made by the majority of such Board of Directors shall be conclusive on the issue and binding on both the Trustee and the said Shirley Johnson; . . . .

"Upon the death of Shirley Johnson, or upon her marriage, whichever shall occur first, the provisions of this subparagraph D shall be of no further force and effect, and all benefits to which Shirley Johnson would have otherwise been entitled shall be held and used by the Trustee in accordance with the other provisions hereof. The provisions of this subparagraph D, which inure to the benefit of Shirley Johnson, are calculated to extend to her support and financial aid in excess of what she might be able to earn, and I was moved to place the limitation of 'marriage' upon her right to re-

ceive benefits hereunder with the thought that in the event of her marriage her need for support from my estate would not be imperative. Accordingly, I have provided that her marriage will terminate further benefits hereunder . . . ."

12. The Trustee was directed to pay out of other income of the trust or, if that be insufficient, then out of the corpus, for the benefit of Gary Johnson, Cliff Johnson and Harry L. Brown, Jr., any and all fees and costs for tuition, room, board, books and other reasonably necessary expenses of a college education, including a reasonable monthly allowance during each month of such college or university attendance not to exceed $50 per month for each of such boys.

13. Decedent's bequest to charity is in paragraph V. F. as follows:

". . . I direct the Trustee to use all of the income of the trust estate, as well as any of the corpus thereof which he in his sole discretion deems unnecessary to the accomplishment of the preceding purposes, for the establishment and maintenance of a foundation to be known as the 'Harry A. Haverlah Foundation', the principal purpose of which shall be the making of loans to deserving high school graduates who have completed their prescribed course with an average of 'B' or better . . . ."

Paragraph VII of decedent's Will states:

". . . it is my paramount and primary desire that ultimately my estate will become the basis for an expanding service to educational aid and other benevolent purposes through the foundation hereinabove mentioned, ..."

14. In June, 1960, the decedent and Harry L. Brown formed a Texas corporation called H. L. BROWN & ASSOCIATES, INCORPORATED, with principal offices to be in Palestine, Texas, the business of which corporation was to be factoring of accounts receivable. The stock of the corporation was owned 49% by decedent and 51% by Harry L. Brown and his wife.

15. The factoring business of H. L. Brown & Associates, Inc. consisted of purchasing accounts receivables of manufacturers, such as furniture manufacturers, at a discount. The said business required a substantial amount of cash on hand and it was believed that the combination of the decedent making available his Franklin Life Insurance Company stock as collateral for borrowings by H. L. Brown & Associates, Inc. and Harry L. Brown's experience in the credit field would cause the corporation to prosper.

16. Up to the time of formation of H. L. Brown & Associates, Inc., Harry L. Brown had spent 10 years in the business of extending credit under circumstances similar to the business which the corporation was engaged in. The decedent had great confidence in Harry L. Brown, which he showed in a very tangible way by putting up his Franklin Life Insurance Company stock as collateral for loans of H. L. Brown & Associates, Inc., which in March, 1964, reached $480,000 and which amounted to $450,000 at the decedent's death. These loans were made through the East Texas National

Bank, Palestine, Texas, with the bulk of the money being furnished by the Bank of the Southwest, Houston, Texas, which participated in said loans to H. L. Brown & Associates, Inc.

17. H. L. Brown & Associates, Inc. has prospered, as is reflected by the following:

Year	*Corporate Net Profit*	*Corporate Net Worth*
FYE 5-31-62	$ 19,893.78	$ 29,352.43
FYE 5-31-63	8,181.20	35,419.67
FYE 5-31-64	24,059,38	52,766.08
FYE 5-31-65	(385.20)	52,723.47
FYE 5-31-66	23,770.81	80,837.99
FYE 5-31-67	32,767.33	104,886.16

18. As is indicated in his Will, the decedent had great confidence in the future of H. L. Brown & Associates, Inc. as to its profitability and the increase in value of his interest therein. Up to the time of his death the decedent had profited in four ways from his Franklin Life Insurance Company stock and his interest in H. L. Brown & Associates, Inc.: (1) decedent received cash dividends and stock dividends on the Franklin Life stock; (2) the market value of the Franklin Life stock had continuously increased; (3) he received a salary from H. L. Brown & Associates, Inc.; and (4) the market value of his H. L. Brown & Associates, Inc. stock continuously increased.

19. At the date of decedent's death, the loans of H. L. Brown & Associates, Inc. which the decedent's Franklin Life stock collateralized could have been paid

off from the assets of the corporation and it could have been reasonably anticipated that there would be assets of the corporation left over thereafter. There was no real possibility that the decedent's Franklin Life stock would be required to be used to satisfy the obligation of the corporation which it secured.

20. At the date of the decedent's death there was no known reason why the continued use of the decedent's Franklin Life stock as collateral for H. L. Brown & Associates, Inc. loans would in any way jeopardize the value thereof to the trust estate, and there were no other known hazards which would jeopardize the value of the decedent's estate to the beneficiaries thereof.

21. At the date of decedent's death, Shirley Johnson was nearly 35 years of age, was in good health and had no known mental or physical health problems. She was a practicing anesthetist, earning in excess of $10,000 per year. Her two sons, Cliff and Gary were 13 and 12 years of age, respectively, in good health, with no known mental or physical health problems. Mrs. Johnson owned her own home, though there was a purchase money obligation still due thereon which she was paying on a monthly basis and she and her two sons lived in modest comfort.

22. At the time of deceden't death, and for several years prior thereto, Shirley Johnson had maintained a Blue Cross health insurance policy covering herself and her sons and had never experienced a serious ill-

ness nor incurred any unusual expenses for medical services or for care and maintenance, nor was there any reason to believe that she would in the future experience any unusual emergency which would require the Trustee to use other accumulated undistributed income of the trust estate or corpus of the trust estate within the provisions of the Will authorizing same for her benefit. The decedent was simply providing for the bare, remote possibility that some such emergency might occur.

23. The income potential of an estate the size of decedent's estate at the time of his death was calculated to produce substantially more than the approximately $10,000 per year which the decedent actually intended for Shirley Johnson to have out of income of his estate, and the accumulation of such additional income from which excess distributions could be made on behalf of Shirley Johnson and her sons was such as to make the possibility of invasion of the corpus of the trust estate for their benefit so remote as to be negligible.

24. Moreover, at the date of decedent's death, the income potential of his estate was such that the possibility that it would be necessary to invade the corpus of the trust estate to pay the educational expenses of Gary Johnson, Cliff Johnson and Harry L. Brown, Jr. was so remote as to be negligible.

25. The interest which charity was to receive from the decedent's estate was presently ascertainable at

the date of decedent's death and the plaintiff is entitled to a charitable bequest deduction of not less than the amount claimed on its estate tax return as adjusted to reflect date of death values.

26. Also, plaintiff is entitled to additional deductions for court costs, administration expenses, attorneys' fees and other expenses related to the ultimate determination of estate and inheritance tax liability.

27. To the extent that any of the foregoing findings of fact may be deemed to be conclusions of law, the same shall be so treated.

PROPOSED CONCLUSIONS OF LAW

1. This is a civil action for refund of estate taxes and interest of $183,760.96, and this Court has jurisdiction under § 1346(A)(1) of Title 28, U.S.C.

2. Under section 2055 of the Internal Revenue Code of 1954 (as effective on December 4, 1964, the date of decedent's death) and the Treasury Regulations thereunder, a deduction for Federal estate tax purposes is allowed for the amount of all bequests, legacies, devises or transfers to a Trustee if such contributions or gifts are to be used by such Trustee exclusively for religious, charitable, scientific, literary or education purposes, provided that no substantial part of the activities of such Trustee is carrying on propaganda or otherwise attempting to influence legislation and such Trustee does not participate in, or intervene in (including the

publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

3. Under the Will of the decedent in this case, the bequest to the Trustee named therein qualified for deduction under section 2055 of the Code because a present interest in the decedent's estate vested in the Trustee to be used for educational purposes. While the Will made provision for income to be paid to noncharitable beneficiaries, the value of the interest of the noncharitable beneficiaries was ascertainable at the date of the decedent's death and thus was severable from the charitable interest. Treas. Reg. § 20.2055-2(a); *Ithaca Trust Company v. U.S.*, 279 U.S. 151 (1929); *Lincoln Rochester Trust Company v. McGowan*, 217 F. 2d 287 (2nd Cir. 1954); *Mercantile-Safe Deposit & Trust Co., Ex'r v. U.S.*, 141 F. Supp. 546 (D.C. Md. 1956).

4. The government contends that the discretion given the Trustee in paragraph V. F. of Haverlah's Will is fatal to the plaintiff's claim that a present interest was created in charity by said provision. It has been repeatedly held that broad discretionary powers in a trustee do not destroy a taxpayer's right to a charitable deduction. See, e.g., *Bowers v. South Carolina National Bank of Greenville*, 228 F. 2d 4 (4th Cir. 1955) and *Comm. v. Est. of G. Robertson*, 141 F. 2d 855 (4th Cir. 1944). Moreover, Haverlah's Will plainly directs the Trustee to determine what is needed for the noncharitable beneficiaries and to use everything else for

educational purposes. In this, the Trustee is given no alternative. The evidence disclosed that the Trustee determined that approximately $10,000 per year would be payable to Shirley Johnson and that a maximum of $48,000 would be needed for the education of the three children. The remainder was to be devoted to the educational purposes in accordance with the directions of the Will.

5. In *Herron, et al v. Heiner*, 24 F. 2d 745 (W.D. Pa., 1927), the Testator, among other things, left his residuary estate in trust authorizing the Trustees to use so much of the income as in their discretion they deemed necessary and reasonable for the support and maintenance of a brother and sister of the decedent. Also, the Trustees were to pay $100 per month annuities to several named individuals. The remainder of the trust income was to be devoted to chartitable purposes. The estate took a charitable deduction for estate tax purposes of the value of the estate after deducting the sum of the present values of the several annuities payable to relatives and a further sum representing the present value of the bequest to the Trustees for the support of the brother and sister. The amount deducted with respect to the support payments to the brother and sister was based on a monthly amount which the Trustees determined would be sufficient to maintain them both. The Commissioner reduced the charitable deduction on the theory that the discretion of the Trustees as to the amount of income which they might

appropriate to the support and maintenance of the brother and sister was unlimited and that they might, therefore, if they saw fit, expend the entire net income from the residuary estate for such purposes. But, the court said that the amount which the Trustees were authorized to expend for the support and maintenance of the brother and sister was limited to that which was reasonable and necessary and that the Trustees' determination of this amount was properly reached and as in the instant case:

> "The Trustees in this case are under obligations to pay everything to charity except a limited ascertainable amount for the maintenance of the two persons. This gift is vested, and covers the excess of the income each year over the needs of the two beneficiaries, which amount is here alone in question.'

Thus, since the present interest vested in charity, the charitable deduction should be based on the value of the property less the present value of the annuities which was to be determined under the mortality tables. That is what was done in the instant case.

Similarly, in Estate of *Frank Edwin Page*, TC Memo 1961-248, 20 T.C.M. 1298, under the Will there involved, the Tax Court found:

> "In our opinion the son received a present vested equitable life estate in the residuary trust at the time of Testator's death to the extent of the payment to him of $100 a month out of income, while the charity received a present equitable interest in the balance of the trust and its income subject to

> the income being diminished in part by reason of the son's contingent rights to additional payments of income upon the occurrence of certain events, and subject further to its being diminished in whole or in part in the discretion of the Trustee, which discretion could be exercised only upon the occurrence of certain contingencies, the probability of which occurrence could not be computed by any actuarial method known to us. Upon this analysis of the facts, it seems to us that the proper method of valuing the charitable bequest is to subtract from the value of the trust corpus the sum of the values of the son's vested life interest in the trust income, his contingent life interests in such income, and his other interests which may be termed his contingent discretionary interest."

Since the son had accepted the sum of $100,000 in commutation of all of his rights (vested, contingent or discretionary) to the trust income, the court found that his was the maximum value of the son's interest in the testamentary trust as of the time of Testator's death.

In *Mercantile-Safe Deposit & Trust Company, Ex'r v. United States*, 172 F. Supp. 72 (D.C. Md. 1959), the decedent by Will left the residue of his estate in trust for the benefit of his sister providing that the Trustee was to pay to the sister only so much of the trust income as the Trustee, in its sole discretion, considering all assets owned by her and all other income, deemed necessary and proper for her reasonable living expenses, comfort, maintenance, and general welfare. Any income not so required was to be accumulated and added to the principal, all of which was to go, upon the sister's death

to a university. Due to the amount of the sister's other means, the court found that the possibility that any of the income from the trust would be used for the benefit of the sister was so remote as to be negligible and, accordingly, the Executor was entitled to deduct the entire residuary estate as a charitable bequest.

See, also, *Charles O. Gilfillan, Ex'r v. Kelm. Coll.*, 128 F. Supp. 291 (D.C. Minn. 1955).

6. Thus, under the provisions of Haverlah's Will establishing a present interest in charity, the Trustee has no discretion as to whether he must use a portion of the trust estate for charitable purposes because he is directed to do this to the extent that income and corpus of the estate is unnecessary to provide for the noncharitable beneficiaries of the estate. The Trustee was to determine the amount which this would take and he did so by determining that it would take $10,000 of income each year to Shirley Johnson and a total of $48,000 of income for the three children. The present value of said income rights were determined and deducted from the net value of the estate available for beneficiaries as a charitable bequest. The fact that what passed to charity constituted, at least to a substantial extent, a present interest in Haverlah's estate explains why the amount of the charitable bequest was not calculated as if it were a remainder interest. Accordingly, no deduction has been claimed for the value of the remainder interest which passed to charity under Haverlah's Will.

7. Notwithstanding the foregoing, where the Trustee is empowered to invade corpus for a noncharitable beneficiary, it is well settled that such power must be subject to an ascertainable standard and the possibility that the charitable transfer will not become effective must be "so remote as to be negligible." or, " * * * highly improbable at the time of the decedent's death, * * *" within the meaning of Treas. Reg. § 20.2055-2(b). In connection with the determination of whether an ascertainable standard exists, the charitable remainder cases are most helpful. That the standard of invasion is sufficiently definite and fixed in this case is amply demonstrated by *Lincoln Rochester Trust Co., Ex'r (Est. of Harroun) v. McGowan*, 217 F. 2d 287 (2nd Cir. 1954). Te basic principle of the *Lincoln Rochester* case has been endorsed and applied in numerous other cases.

Further examples of ascertainable standards are *Commissioner v. Wells Fargo Bank & Union Trust Co.*, 145 F. 2d 130 (9th Cir. 1944) ("on account of any sickness, accident, want or other emergency"); *St. Louis Union Trust Co., Ex'r v. United States*, 374 F. 2d 427 (8th Cir. 1967) ("to provide against any emergency which may arise affecting her occasioned by sickness, accident, ill health, affliction, misfortune or otherwise."); *Nardi v. United States*, 385 F. 2d 343 (7th Cir. 1967) ("Because of accident, sickness, or other emergency or unusual condition of any kind * * * [which causes him to] be in need of extra funds."); *First National Bank of Akron, Ex'r v. United States*, 69-1 USTC

¶12,602 (D.C. Ohio 1969) ("accident, illness, other financial emergency of the income beneficiary or to maintain her in the standard of living which she has heretofore enjoyed. It is the intention of the Grantor that this power vested in the Trustee shall be liberally exercised, regardless of the effect which any such invasion or invasions may have been upon the remainderman."). That invasions for emergencies constitutes an ascertainable standard is recognized in Gift Tax Regulations § 25.2511-1(g)(2): "For instance, a power to distribute corpus * * * to meet an emergency would be such a standard." See, also *S.H. Salisbury, Ex'r v. United States*, 377 F. 2d 700 (2nd Cir. 1967).

8. On the other hand, the standard has been held not to be readily ascertainable in such cases as *Merchants National Bank v. Commissioner*, 320 U.S. 256 (1943) ("comfort, support, maintenance and/or happiness," the Trustee's discretion to be exercised with "liberality to my said wife and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries"); *Henslee v. Union Planters National Bank*, 335 U.S. 595 (1949) ("pleasure, comfort and welfare of my mother" and "in such manner as she may desire"); and *Marine Trust Co. v. United States*, 247 F. Supp. 278 (W.D. N.Y. 1965) ("sickness, accident, misfortune or other circumstances * * * or for any other reason.").

9. It is clear from Haverlah's Will that the emergency invasion of corpus provisions were intended for the purpose of support. On page ten of his Will, Haverlah said:

> "The provisions of this sub-paragraph D, which inure to the benefit of Shirley Johnson, are calculated to extend to her *support* and financial aid in excess of what she might be able to earn, and I was moved to place the limitation of 'marriage' upon her right to receive benefits hereunder with the thought that in the event of her marriage her need for *support* from my estate would not be imperative." (Emphasis supplied.)

Thus the invasion powers in the instant case clearly fall in line with those cases cited above which found there was an ascertainable standard.

10. It is equally clear that at the date of Haverlah's death, the possibility that the corpus would be invaded was so remote as to be negligible or highly improbable as is required by the Treasury Regulations and case law.

11. In any event, the possibility of invasion for noncharitable purposes, as well as the value of the income interest of Shirley Johnson, Cliff Johnson, Gary Johnson and Harry L. Brown, Jr. has been more than adequately recognized and accounted for on Haverlah's Federal Estate tax return and charity received or will receive not less than the amount claimed thereon.

12. The plaintiff is entitled to a refund of estate taxes and interest of $183,760.96 plus interest according to

law, or such larger amount as may be due to additional deductions for court costs, administration expenses, attorneys' fees and other expenses related to the ultimate determination of estate and inheritance tax liability, and judgment should be entered accordingly.

13. To the extent that any of the foregoing conclusions of law is deemed to be a finding of fact, the same shall be so treated.

ENTERED this 26th day of April, A.D. 1971.

United States District Judge

In the
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 71 - 3006

ESTATE OF HARRY A. HAVERLAH, DECEASED,
HARRY L. BROWN, EXECUTOR,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas
(July 27, 1972)

Before GOLDBERG, DYER, and SIMPSON, Circuit Judges.

GOLDBERG, Circuit Judge: Plaintiff, Harry L. Brown, is the acting executor and trustee of the estate of Harry A. Haverlah, who died in December of 1964 while domiciled in Palestine, Texas. Plaintiff instituted this refund suit in federal district court, claiming that the estate was entitled to a charitable deduction because the value of a charitable remainder was presently ascertainable at the date of the decedent's death. The district court determined that the testamentary trust created by Haverlah with a papered charitable remainder was not fenced out of an estate tax deduction by the statute and concomitant regulations. The

government appeals that ruling, and we reverse. Under our analysis of the statutory scheme, as viewed and measured by the decided cases, one of the plenary powers granted to the plaintiff as executor and trustee is simply too gargantuan to crawl through the statutory and judicial holes carved out of the regulatory fences.

The facts as found by the district court reveal that in his last will and testament the decedent created a trust, the income and corpus of which are to be used for the establishment and maintenance of the Harry A. Haverlah Foundation, the principal purpose of which is to be the making of educational loans to deserving high school graduates. While the decedent's primary desire was to use his estate for educational purposes, he also felt the need to provide for non-charitable beneficiaries.

During his lifetime the decedent was instrumental in the organization and growth of H. L. Brown & Associates, Inc., a factoring business located in Palestine, Texas. At the time of his death the decedent owned 49% of the stock of the corporation, with the remainder being owned by plaintiff and his wife. The decedent had great confidence in the plaintiff, as evidenced by the fiduciary positions granted him under the provisions of the decedent's will. The decedent also entertained great confidence in the future of H. L.

Brown & Associates, both as to its profitability and as to the likely increase in value of his 49% interest. In order that the Brown enterprise be encouraged to succeed and expand to the end that the decedent's trust and the purpose for which it was created would ultimately benefit, the decedent in his will made the entirety of his estate available to the corporation. Under the terms of the trust instrument, the trustee was authorized to make available to H. L. Brown & Associates, or any successor corporation, all or any part of the decedent's estate to be used as collateral for securing loans to the corporation. The trustee was also directed to make unsecured and unlimited loans to the company from any sums of cash in the hands of the trustee. At the time of his death decedent owned a considerable number of shares in the Franklin Life Insurance Company, and this stock stood as collateral for corporate loans totaling $450,000. However, the district court found that there existed no real possibility that the decedent's Franklin Life stock would be needed to satisfy the corporate obligation which it secured.

In addition to making all of the trust assets available to the plaintiff's factoring business, the trust instrument expressly directed the trustee to pay out of trust income or corpus all costs, expenses, and charges incurred by one Shirley Johnson for any unusual medi-

cal services. In addition, the trustee was directed to pay from the trust assets Shirley Johnson's reasonable costs and expenses of any unusual emergency of a character other than that related to health and medical care. Consistent with his desire that his estate be used for educational purposes, the decedent also empowered the trustee to pay for the benefit of Shirley Johnson's two sons and for the plaintiff's son all reasonably necessary expenses for a course of higher learning in a college or university in the State of Texas.

The district court concluded that the taxpayer was entitled to an estate tax deduction in the requested amount, holding that the trustee's invasionary powers, either singly or in combination, did not operate to destroy the measurability of the charitable remainder. On appeal the government contends that the decedent's charitable bequest to the Foundation is subject to such dimunition through the exercise of rights and powers vested in the trustee that the bequest is not deductible from the decedent's gross estate as a transfer for a charitable purpose. It is the government's position that each of the several invasionary powers granted to the trustee standing alone makes the value of the charitable remainder interest not presently ascertainable at the date of the decedent's death. We agree that the trustee's unlimited power to subject the trust assets to the vicissitudes of the H. L. Brown enterprise ren-

ders the charitable bequest to the Harry A. Haverlah Foundation non-deductible. Accordingly, we intimate no opinion as to the effect of the other invasionary powers upon the deductibility of the charitable remainder.

Section 2055 of the Internal Revenue Code of 1954 allows a deduction from the gross estate of a decedent for "all bequests, legacies, devises, or transfers . . .

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes." 26 U.S.C.A. § 2055(a).

The Treasury Regulations which implement this statutory provision permit deduction from a decedent's gross estate of the value of a charitable remainder interest if, at the time of the decedent's death, that interest is "presently ascertainable" and the "possibility that the charitable transfer will not become effective is so remote as to be negligible."[1] This court

[1] Section 20.2055-2 Regs. provides:

(a) *Remainders and similar interest. If a trust is created or property is transferred for both a charitable and a private purpose deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hense severable from the noncharitable interest.* The present value of a remainder or other deferred payment to be made for a charitable purpose is to be determined in accordance with the rules stated in Sec. 20.2031-7. Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay the principal to a charitable organization, the present value of the remainder is deductible. To determine the present value of such remainder use the appropriate factor from column 4 of Table I or Table II of Sec. 20.2031-7, whichever is applicable. * * *

recently upheld the validity of these regulations in *Florida Bank at Lakeland v. United States*, 5 Cir. 1971, 443 F.2d 467. In explaining the necessity for such regulations we remarked:

> "It is a simple matter, of course, for executors of an estate and the Internal Revenue Service to agree on the amount of a charitable deduction if it is made as a direct bequest or legacy without any intervening life estate or other term of years prior to enjoyment, although it involves the uncertainties that always attach to actuarial computations and other matters involving life expectancies. It is, of course, possible to compute the present value of a remainder interest, so long as nothing more is involved than the element of time. Such problem is magnified until it finally becomes impossible of solution as the number of items is increased which may make impossible the final enjoyment by the charitable remainder of the bequest, or which may make impossible a present valuation. These difficulties were fully recognized, and a formulation of

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(b) *Transfers subject to a condition or a power.* If, as of the date of decedent's death, a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, *no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible.* If an estate or interest has passed to or is vested in charity at the time of a decedent's death and the estate or interest would be defeated by the performance of some act or the happening of some event, the occurrence of which appeared to have been highly improbable at the time of the decedent's death, the deduction is allowable. *If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, the deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of the power.*

26 C.F.R. § 20.2055-2 [emphasis added].

> rules was devised by the Internal Revenue Service to cope with the problem in Regulations 20.2055-2, *supra*. Thus it is that the remainder here given to charity may be taken only 'insofar as that interest is presently ascertainable' and 'no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible.'"

Id. at 469. In the instant case the district court determined that at the date of Haverlah's death the possibility that the charitable transfer would not become effective "was so remote as to be negligible or highly improbable as is required by the Treasury Regulations and case law." In addition, the trial court held that the interest which the Haverlah Foundation was to receive from the trust was presently ascertainable at the date of the decedent's death. We do not disagree with the remoteness of the possible inefficacy of the charitable transfer. However, our analysis of relevant Supreme Court rulings convinces us that at the time of the decedent's death the value of his bequest to the Haverlah Foundation was not presently ascertainable within the intent of the Code and the attendant regulations.

In a series of cases extending over a period of several decades, the Supreme Court developed a broad-gauged principle to determine whether or not the value of a charitable remainder is "presently ascertainable." The Court first had occasion to confront the

problem in *Ithaca Trust Co. v. United States*, 1928, 279 U.S. 151, 154, 49 S.Ct. 291, , 73 L.Ed. 647, 649, where a decedent left the residue of his estate in trust for the benefit of admitted charities, but granted the trustee the authority to use any sum of money from the trust corpus "that may be necessary to suitably maintain [the decedent's wife] in as much comfort as she now enjoys." The Court held that this invasionary power did not render the gifts to charity so uncertain that a charitable deduction should be disallowed. The Court, speaking through Mr. Justice Holmes, supported its ruling in the following words:

> "The [trust] principle that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator and even after debts and specific legacies had been paid was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs."

279 U.S. at 154. It is the taxpayer's position that this standard should be directly applied in the instant case. In applying this standard, the plaintiff asserts that the probable depletion of the trust resulting from his authority to subject the corpus to the fortunes of the factoring business involved "no uncertainty appreciably

greater than the general uncertainty that attends human affairs." Of course, we are not in a position to disagree with the plaintiff's assessment as to the relative certainty of the financial success of H. L. Brown & Associates, Inc. However, we believe that the plaintiff is incorrect in claiming that the Supreme Court in *Ithaca Trust* held that the measure of the value of a charitable remainder need not be any more reliable than the "general uncertainty that attends human affairs," in order to qualify for a deduction under Section 2055.

In *Merchants National Bank v. Commissioner*, 1943, 320 U.S. 256, 64 S.Ct. 108, 88 L.Ed. 35, the Supreme Court once again undertook to elucidate the meaning of "presently ascertainable." There, a decedent placed his entire estate in trust to certain named charities, with authorization to the trustee to invade the corpus at such time as "my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife," 320 U.S. at 257-58. Furthermore the settlor specifically directed the trustee to exercise its discretion with respect to its invasionary powers with liberality to the decedent's wife. In denying the taxpayer a deduction for the charitable remainder, the Court noted that "[o]nly where the conditions on which the extent of invasion are fixed by reference to some readily ascer-

tainable and reliably predictable facts do the amount which will be diverted from the charity and the present value of the bequest become adequately measurable." 320 U.S. at 261. Even though the decedent's widow was sixty-seven years of age, lived a frugal life with substantial independent means, and had no dependent children, the Court held that the conditions of invasion were not so fixed because the trustee could disburse those sums which the widow's happiness might require to be expended.

The last link in the concatenation of Supreme Court cases contouring the "presently ascertainable" standard is *Henslee v. Union Planters National Bank & Trust Co.*, 1949, 335 U.S. 595, 69 S.Ct. 290, 93 L.Ed. 259. In *Henslee* the testator authorized the trustees to "expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother." 335 U.S. at 596. The balance of the trust was to be paid over to four named charities, and the executors and trustees sought an estate tax deduction for the value of the charitable remainder. At the time of his death the decedent's mother was eighty-five years old, lived on substantially less than the monthly net income produced by the estate, and possessed independent investments which generated income of $300 per month. Furthermore, a postmortem revealed that the decedent's mother died

within three years of the decedent's death without ever having requested the trustees or executors to invade the trust corpus on her behalf. Nevertheless, the Supreme Court denied the requested deduction. Relying upon its decision in *Merchants National Bank*, the Court stated:

> "We agree with the District Court that this case is governed by the decision in the Merchants Bank Case and that the suit should be dismissed. It is apparent on the face of the complaint that this testator's will did not limit the trustees' disbursements to conformity with some ready standard — as where, for example, trustees are to provide the prime beneficiary with such sums as 'may be necessary to suitably maintain her in as much comfort as she now enjoys.' Ithaca Trust Co. v. United States, 279 US 151, 154, 73 L ed 647, 649, 49 S Ct 291. The stated income here directed to be paid to the mother was 'to be used by her as she sees fit.' Beyond this the trustees were empowered to invade or wholly utilize the corpus of the estate for the mother's 'pleasure, comfort and welfare,' bearing in mind the testator's injunction that 'The first object to be accomplished . . . is to take care of and provide for my mother in such manner as she may desire . . . .' As in the Merchants Bank Case, where the trustees had discretion to disburse sums for the 'comfort, support, maintenance, and/or happiness' of the prime beneficiary, so here we think it the 'salient fact . . . that the purposes for which the widow could, and might wish to have the funds spent do not lend themselves to reliable prediction.' 320 US 256, 262, 88 L ed 35, 40, 64 S Ct 108."

335 U.S. at 598-99 [footnotes omitted].

Before applying to the instant action the principles developed in this trilogy of Supreme Court cases, we must first explore the realities of the plaintiff's invasionary power under the dictates of the decedent's will. As noted above, the plaintiff, as trustee, was given express authority both to employ any and all of the trust assets as collateral for loans and to use any and all cash for unsecured loans to the H. L. Brown enterprise, or any successor corporation. The trustee was also granted the general power, consistent with a standard of reasonable care, to invest and re-invest the trust estate in such real and personal property as may appear to the trustee to be in the best interests of the trust. At the time of the decedent's death the plaintiff was president of the Brown corporation and owned a majority of the company's capital stock. Of course, in determining whether or not the charitable remainder in this case is "presently ascertainable," we recognize that our task is limited to an evaluation of the invasionary power of the trustee under the express terms of the grant. *Estate of Stewart v. Commissioner of Internal Revenue*, 3 Cir. 1971, 436 F.2d 1281; *Strite v. McGinnes*, E.D. Pa. 1963, 215 F.Supp. 513, *aff'd* 3 Cir. 330 F.2d 234, *cert. denied*, 1964, 379 U.S. 876, 85 S.Ct. 69, 13 L.Ed.2d 43. However, we think we are obligated to include in our evaluation of this trust instrument the trustee's ownership and control

of the H. L. Brown corporation. It is quite obvious from the trust instrument itself that the trustee's control and ownership of H. L. Brown & Associates, Inc., constituted an essential ingredient in the decedent's overall testamentary plan. This is evidenced by the fact that the decedent defined the term "successor corporation," as any corporation organized for the purpose of conducting a finance business in which the plaintiff owns at least fifty-one per cent of the corporate stock, in which plaintiff is president, and in which the decedent's estate owns stock in an amount equal to or greater than the decedent's percentage of stock ownership in H. L. Brown & Associates, Inc., at the time of his death. Finally, we note that Haverlah stated in his will that the invasionary powers granted to the trustee, including the power to loan money to the Brown corporation, were sufficient to provide adequately for those to whom the decedent felt the strongest and most compelling financial obligations. Indeed, in that portion of his will in which he made the charitable bequest, the decendent directed the trustee to establish the Harry L. Haverlah Foundation by using all of the income of the trust estate and any of the trust corpus which the trustee in his sole discretion deemed unnecessary for the accomplishment of the purposes to be served by the invasionary powers. The decedent quite clearly intended that the plaintiff was to employ his invasionary powers with liberality to-

ward the non-charitable beneficiaries and to the detriment of the charitable foundation.

In light of the decedent's scheme, we hold that the amount of the charitable bequest was not presently ascertainable at the time of his death. We find that the plaintiff's authority to finance a business operation is totally unlike that power delivered to the trustee in *Ithaca Trust* and more closely analogous to the invasionary powers granted to the fiduciaries in *Merchants National Bank* and *Henslee*. In *Ithaca Trust* the depletion of the trust corpus could not be wrought by the guiding hand of individual volition. If invasion became a necessity, the extent of the depletion could not be dictated by the whim or caprice of either trustee or beneficiary. However, in contrast to this delimitation, the exact opposite prevailed in both *Merchants National Bank* and *Henslee*. In *Merchants National Bank* the testator's bounty had to accommodate the comfort and happiness of his wife, while in *Henslee* depletion of the trust corpus could be effected to serve the pleasure and comfort of the decedent's mother. In our opinion the value of the charitable remainder is unascertainable in the instant case because of the potential legitimized siphoning of the trust assets to the plaintiff's alter ego, H. L. Brown & Associates, Inc. Our determination of unascertainability is not pinioned upon the fact that the trustee possessed the

power to subject the corpus of the Haverlah trust to the business risks of a single enterprise. Rather it is that power taken in conjunction with the plaintiff's ultimate control of the enterprise that leads us to conclude that the statutory requirements of ascertainability have not been satisfied. In essence, the decedent has permitted the plaintiff to hypothecate to himself, without the veto or restraint of any mundane power, any or all of the trust's assets. It is our conclusion that such limitless authority to founder the foundation destroys the requisite inviolability of the chartiable remainder. *Rand v. United States*, 2 Cir. 1971, 445 F.2d 1166.

The plaintiff finds considerable support for his position in the quoted statement of Mr. Justice Holmes in *Ithaca Trust*, claiming that the possibility that the trust corpus might be depleted because of the financial failure of the Brown corporation involves no uncertainty appreciably greater "than the general uncertainty that attends human affairs." As we read the *Ithaca Trust* case, Mr. Justice Holmes' remarks was intended as an answer to the contention that the trust corpus in that case might be depleted even though the trustee followed faithfully the prescribed standard. The trustee in *Ithaca Trust* was directed to invade the corpus to maintain the widow in as much comfort as she enjoyed at the time of her husband's death. Assum-

ing, for example, that the income on trust investments decreased substantially, there did exist the possibility that the corpus could be totally depleted by the widow's then-existing comfort. However, recognizing that neither the statute nor the regulations require an absolute and certain valuation of the charitable remainder, the Court noted that in order to qualify a bequest for an estate tax deduction a testator need not insure the charitable remainder against the general uncertainty that attends human affairs. With this interpretation the Court's language in Ithaca Trust does not aid the plaintiff in his quest for an estate tax deduction, for Haverlah's will contains no objective standard interpositioned between the "general uncertainty that attends human affairs" and the plaintiff's invasionary power.

The plaintiff also seeks to support an estate tax deduction for the charitable remainder on the basis of the district court's findings that (1) there existed no real possibility that the decedent's Franklin Life stock would be needed to satisfy the corporate obligation which it secured, and (2) the possibility that the charitable transfer would not become effective was so remote as to be negligible. While we fully accept, as a factual matter, the unlikelihood of any ultimate dimunition of the trust corpus as a consequence of the plaintiff's exercise of his invasionary powers, we never-

theless remain firm in our conclusion that the value of this charitable remainder is not "presently ascertainable." Factors of predictability, no matter how susceptible to proof as certitudes, simply cannot be weighed in our ultimate decision. As the Supreme Court stated in *Henslee:*

> "We do not overlook the unlikelihood that a woman of the mother's age and circumstances would abandon her customary frugality and squander her son's wealth. But, though there may have been little chance of that extravagance which would waste a part or consume the whole of the charitable interest, that chance remained. What common experience might regard as remote in the generality of cases may nonetheless be beyond the realm of precise prediction in the single instance. The contingency which would have diminished or destroyed the charitable interest here considered might well have been insured against, but such an arithmetic generalization of experience would not have made this charitable interest 'presently ascertainable.' 'Rough guesses, approximations, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient.' Merchants Nat. Bank v. Commissioner, supra (320 US at 261, 88 L ed 39, 64 S Ct 108).
>
> Nor do we think it significant that the trust corpus was intact at the mother's death, for the test of present ascertainability of the ultimate charitable interest is applied 'at the death of the testator.' Ibid. The charitable deduction is a matter of congressional grace, and it is for Congress to determine the advisability of permitting amendment of estate

> tax returns at such time as the probable vesting of the charitable interest has reduced itself to unalterable fact."

335 U.S. at 599-600 [footnotes omitted]. *See Estate of Stewart v. Commissioner of Internal Revenue, supra.* This language requires that we ignore "extrinsic circumstances when the will itself furnishes no definite standard of guidance." *Seubert v. Shaughnessy*, 2 Cir. 1956, 233 F.2d 134. Since we have held that no amount of charitable construction of the decedent's will would impose objective restraints upon the plaintiff's authority through possible economic excursions to flex and to malleate the quantum of the charitable remainder, we are constrained to disregard the district court's findings on postmortem probabilities.[2]

While recognizing that some testators could escape taxation between the barbs and the wire of the regulatory fences established by legislative edict, we hasten to note that Congress in its wisdom has required at a minimum some certitude in the relaxation of estate taxes for charitable purposes. The trustee in this case

[2]While we are not permitted in this case to consider any autopsic circumstances, we point out that the plaintiff, about a year after the decedent's death, sold the estate's major asset (Franklin Life Insurance stock) and simultaneously loaned $450,000 to H. L. Brown & Associates to pay off a loan which the corporation was unable to pay from its own cash reserves. For several months in 1968 the amount loaned to the Brown corporation from the trust assets exceeded $550,000, which is more than sixty per cent of the value of the decedent's gross estate at the date of his death. Also in 1968 the plaintiff sold to himself, at a book value of approximately $26,000, the estate's entire 147 shares of stock in H. L. Brown & Associates, Inc.

was given an itinerary that directed him to be so charitable to the non-charitable beneficiaries that he could legitimately cargo to H. L. Brown & Associates, Inc., all of the assets of the Haverlah trust. We do not think that Congress intended a captain to have this navigational latitude. The statutes and regulations, painted with a judicial gloss, dictate that some testamentary clutching and restraint must engine the trust estate with an assured certainty that the charity will receive the testator's largesse at journey's end. In this case the plaintiff's plenteous power to pirate the cargo on its trust journey rendered unascertainable the value of the charitable remainder for statutory exclusion from estate taxation. Therefore, the judgment of the district court is reversed, and the case is remanded with directions to dismiss the plaintiff's complaint.

REVERSED and REMANDED
WITH DIRECTIONS

LAST WILL AND TESTAMENT OF HARRY A. HAVERLAH

THE STATE OF TEXAS
COUNTY OF ANDERSON

KNOW ALL MEN BY THESE PRESENTS:

That I, Harry A. Haverlah, a single man, of the County of Anderson, State of Texas, being of sound and disposing mind and memory, above the age of 21 years, and wishing to make provision for the disposition of my estatae while I have strength so to do, do hereby make, declare and publish this, my last will and testament, hereby revoking any and all other wills and codicils previously made by me.

I.

I direct that my legal debts, funeral expenses and all inheritance taxes, estate and succession taxes on what is included in my estate for the purpose of said taxes, be paid by my Executor and charged against my residuary estate, and not against the person, corporation, trust or foundation receiving or in possession of the property taxes or receiving the benefit thereof; and I direct that there shall be no proration or apportionment of said taxes. My Executor may, in his discretion, extend or renew any debt of my estate upon such terms and for such time as he may deem best.

II.

After the payment of my debts, funeral expenses and all taxes, as provided in paragraph numbered I

hereof, I give and bequeath to Harry L. Brown, as Trustee, all the rest and residue of my estate of every kind and character of which I may die seized and possessed, which such rest and residue of my estate is to be held, administered and distributed by my said Trustee, all in accordance with the succeeding terms and provisions hereof.

III.

I hereby nominate and appoint my friend and business associate, Harry L. Brown, of Anderson County, Texas, Independent Executor of this my last will and testament, and I direct that no bond or other security shall be required of him as such and that no action shall be had in any Court in relation to the settlement of my estate than the probating and recording of this will, the taking of the oath by my Executor, and the return of an inventory and appraisement and list of claims due my said estate, and all claims due and owing by me at the time of my death. Harry L. Brown is also named and appointed Trustee herein, and I also direct that no bond or other security ever be required of him in that capacity.

IV.

I authorize and empower my said Independent Executor to sell, dispose of, deliver, mortgage, encumber, lease for oil and gas, or convey any portion of my estate, real or personal, at public or private sale, for any price, upon any terms, or in any manner that may seem best to my said Executor for the purpose of paying any of

my debts, or for the payment of any taxes due upon my estate, or for whatever reason my Executor deems in the best interests of my estate. Further, my said Independent Executor shall have all the powers given to trustees under the provisions of the Texas Trust Act, other than where and to the extent that the same may be inconsisent or in conflict with any of the provisions of this will. I also further specifically authorize my Independent Executor to institute, defend, prosecute, litigate, compromise, settle or in any other manner handle in behalf of my estate any controversy or claims involving my said estate, and to employ an attorney or attorneys incident thereto and pay the fees therefor, together with any costs incident thereto, out of my said estate.

V.

A. The trust estate or corpus of the trust created under the terms of this will shall consist of the rest and residue of my estate after the payment of debts and taxes, all of which shall be delivered over by my said Independent Executor to the Trustee in its entirety after the payment of all such debts and taxes and the conclusion of the due course of administration of my estate, or in parcels or portions at different times prior to the conclusion of the due course of administration of my estate and the payment of all debts and taxes, and any additions thereto coming into the hands of the Trustee thereafter, including but not limited to any undistributed income.

B. The Trustee shall accept from the Executor and thereafter hold, protect, use, manage, sell, mortgage, pledge, improve, make additions to, invest, re-invest and pay over the corpus of the trust, any income or proceeds thereof and any additions thereto, as hereinafter provided.

C. I reasonably anticipate that at the time of my death a substantial portion of my estate will consist of the corporate stock of H. L. Brown & Associates, Inc., a corporation of which Harry L. Brown is now President. I was instrumental in the organization and incorporation of H. L. Brown & Associates, Inc., and it is not reasonably likely that H. L. Brown & Associates, Inc. would have enjoyed the degree of success which it has enjoyed without my having made available to it, as collateral in its negotiation of loans, my corporate stock in Franklin Life Insurance Company, and a substantial amount of my corporate stock in said life insurance company is now pledged as collateral or security for loans now owed by H. L. Brown & Associates, Inc. In order that H. L. Brown & Associates, Inc., may be encouraged to further succeed and expand to the end that this trust and the purposes for which it is intended may thereby benefit, I authorize, empower and direct my Trustee to make available to H. L. Brown & Associates, Inc. or any successor corporation, as that term is herein defined, all or any part of my estate, including but not limited to the capital stock of Franklin Life Insurance Company, as collateral for the securing of

loans in behalf of H. L. Brown & Associates, Inc. or any successor corporation, to the end that H. L. Brown & Associates, Inc., and any successor corporation, acting by and through Harry L. Brown as its President, may hereafter continue to use all or any portion of my estate, including but not limited to my corporate stock in Franklin Life Insurance Company, as security for the loans deemed necessary for the proper, successful and profitable conduct of the business of H. L. Brown & Associates, Inc. or the business of any successor corporation.

By the term "successor corporation", as that term is herein used, is meant any corporation hereafter organized for the conduct of a finance business, in which corporation Harry L. Brown owns at least 51% of the capital stock, of which corporation Harry L. Brown is President, and in which corporation my estate owns stock to an extent equal to or greater than the percentage of my stock ownership in H. L. Brown & Associates, Inc., at the time of my death. In the event H. L. Brown & Associates, Inc. should be dissolved and Harry L. Brown thereafter organizes and owns at least 51% of the corporate stock of such new corporation organized for the purpose of conducting a finance business, then and in such event my Executor and Trustee are authorized, empowered and directed to reinvest in such new corporation to the same or to a greater percentage of stock ownership therein as the percentage of my stock ownership of H. L. Brown & Associates, Inc. at the time of its dissolution.

In the event H. L. Brown & Associates, Inc. or any successor corporation makes use of all or any portion of my estate for the purposes of collateral as provided in this paragraph, H. L. Brown & Associates, Inc. or any successor corporation shall pay to my Executor or to my Trustee a monthly fee therefor, during each month the same is used, as follows:

(a) If Harry L. Brown is then drawing a salary from H. L. Brown & Associates, Inc. or from a successor corporation equal to or less than $825.00 per month, such fee shall be $125.00 per month.

(b) If Harry L. Brown is drawing a salary from H. L. Brown & Associates, Inc. or from a successor corporation in excess of $825.00 per month, such monthly fee shall be the sum of $125.00 plus the difference between the actual monthly salary of Harry L. Brown and the sum of $825.00.

The Trustee is further specifically authorized and empowered to make loans to H. L. Brown & Associates, Inc., or any successor corporation, from any sums of cash in the hands of the Trustee, which loans shall be made by the Trustee on terms the same or substantially the same as those then in existence between H. L. Brown & Associates, Inc. or any successor corporation and other lending institutions, provided, however, any such loans made by the Trustee to H. L. Brown & Associates, Inc. or any successor corporation need not be secured.

D. The Trustee is directed to pay over to Shirley Johnson, for and during her lifetime or until she shall marry, as the same are collected, all cash dividends paid on my Franklin Life Insurance Company stock.

Further, the Trustee shall pay over to Shirley Johnson, for and during her lifetime or until she shall marry, as the same are collected, any and all fees paid to the Trustee by H. L. Brown & Associates, Inc. or any successor corporation for its use of any portion of the corpus of the trust estate as collateral; and in the event during any month no such fee is paid by H. L. Brown & Associates, Inc. or any successor corporation, or in the event during any month such fee is less than $450.00, the Trustee is directed to pay over to the said Shirley Johnson a sum of money equal to the difference between $450.00 and the fee actually paid to the Trustee by H. L. Brown & Associates, Inc. or any successor corporation. Such sum shall be paid first out of any undistributed income then in the hands of the Trustee, but if there be no undistributed income or if it be insufficient in amount to assure such regular monthly payment to Shirley Johnson of $450.00, then I authorize and direct the Trustee to pay such sum to the said Shirley Johnson out of the corpus of the trust estate.

In addition to the other provisions of this subparagraph D hereof, for and during the lifetime of Shirley Johnson or until she shall marry, my Trustee is authorized, empowered and directed to regularly or from time to time, as the need arises and for as long as the

need therefor may continue, pay out of any accumulated undistributed income of the trust estate, or if such undistributed income be insufficient therefor, the Trustee is authorized to sell the corpus of the trust estate to the extent necessary and to pay from the proceeds of such sale, all costs, expenses and charges for any unusual medical services and all costs and expenses for unusual care and maintenance, including but not limited to the fees and charges of doctors, surgeons, nurses, laboratory fees, hospitals and clinics, incurred by Shirley Johnson, or incurred by either Gary Johnson or Cliff Johnson at any time while the one of said boys incurring the same shall be less than 21 years of age and in the legal custody of Shirley Johnson; and further, the Trustee is authorized, empowered and directed in behalf of the said Shirley Johnson to pay the reasonable costs and expenses of any unusual emergency of a character other than that related to health or medical care. With reference to this emergency provision for additional benefits for the said Shirley Johnson, the Trustee may in his sole discretion determine that the condition called to his attention by Shirley Johnson is unusual and of an emergency nature, in which case he shall forthwith make payments therefor as herein provided; but in the event the Trustee declines to deem such condition unusual or of an emergency nature when the same is called to his attention by the said Shirley Johnson, and the said Shirley Johnson believes the judgment of the Trustee thereon

to be in error, then and in such event the determination of the matter as to whether or not such condition is "unusual" or of an "emergency" nature shall be made by the Board of Directors of H. L. Brown & Associates, Inc. or any successor corporation, to the end that a decision thereon made by the majority of such Board of Directors shall be conclusive on the issue and binding on both the Trustee and the said Shirley Johnson; and the fact that the Trustee may be a member of the Board of Directors of H. L. Brown & Associates, Inc. or any successor corporation, shall not disqualify him in voting on such decision. In this regard, the Trustee may pay any such fees, charges or costs herein authorized either to Shirley Johnson or directly to the person, firm or institution furnishing such services or to whom such payments may be due, immediately upon receipt by the Trustee of evidence establishing to the reasonable satisfaction of the Trustee that such services have been so rendered.

I further direct my Trustee to extend to Shirley Johnson and her two sons, Gary Johnson and Cliff Johnson, the right and privilege at any and all times of using and enjoying any real estate belonging to my estate for the purpose of hunting and fishing and for other recreational purposes, for and during the lifetime of Shirley Johnson or until she shall marry.

Upon the death of Shirley Johnson, or upon her marriage, whichever shall occur first, the provisions of this subparagraph D shall be of no further force and

effect, and all benefits to which Shirley Johnson would have otherwise been entitled shall be held and used by the Trustee in accordance with the other provisions hereof. The provisions of this subparagraph D, which inure to the benefit of Shirley Johnson, are calculated to extend to her support and financial aid in excess of what she might be able to earn, and I was moved to place the limitation of "marriage" upon her right to receive benefits hereunder with the thought that in the event of her marriage her need for support from my estate would not be imperative. Accordingly, I have provided that her marriage will terminate further benefits hereunder. In my use of the word "marriage" and the word "marry" it was not my intent to limit the meaning to a strict and legal marriage, either ceremonial or common law, and the word "marriage" or "marry" as used in this will shall be deemed by the Trustee to include any relationship which ostensibly resembles or suggests a marital relationship. It is not my wish or intention to discourage Shirley Johnson from entering into a marriage, however I trust that the inclusion of this provision will serve to discourage the pursuit of Shirley Johnson by those who would without sincerity and with ulterior motives direct their attentions to her.

E. Out of any other income of the trust estate, or if there be an insufficient amount of income, then out of the corpus of the trust estate, the Trustee is directed to pay for the benefit of Gary Johnson, Cliff Johnson

and Harry L. Brown, Jr. any and all fees and costs for tuition, room, board, books and other reasonably necessary expenses of a course of higher education in any accredited college or university of his choice within the State of Texas, including a reasonable monthly allowance during each month of such college or university attendance not to exceed $50.00 per month for each of such boys. I do not prescribe the number of years for which this benefit shall continue, for the reason that I do not know, and neither of said three boys know, what course of study they would like to pursue. It is my intention, however, to avail this privilege of education to them, subject to the other limitations herein contained, for that number of years which is normally required for receipt of a degree in the chosen course of study by continuous attendance during regular semesters of the college of their choice. In this regard, any monthly allowance paid to either Gary Johnson, Cliff Johnson or Harry L. Brown, Jr. shall be paid by the Trustee directly to them; however, the Trustee shall have the discretion of paying any and all other such fees and charges herein mentioned either to Gary Johnson, Cliff Johnson or Harry L. Brown, Jr. or directly to the person, firm or institution furnishing to Gary Johnson, Cliff Johnson or Harry L. Brown, Jr. the service or thing for which charge is incurred, immediately upon receipt by the Trustee of evidence establishing to the reasonable satisfaction of said Trustee that such service or thing has been so rendered or furnished. But I direct that upon the failure of either

Gary Johnson, Cliff Johnson or Harry L. Brown, Jr. to enroll in some accredited college or university at the first regular semester following his graduation from High School, or upon his failure to complete with satisfactory grades any regular semester of such college or university after having enrolled, or upon his failure to continue to enroll in succeeding regular semesters of such college or university, the provisions of this subparagraph E shall cease and terminate with reference to that one of said boys so defaulting.

F. It is my belief that the preceding provisions hereof adequately provide for those to whom I feel the strongest and most compelling financial obligations. Subject only to the preceding provisions hereof, I direct the Trustee to use all of the income of the trust estate, as well as any of the corpus thereof which he in his sole discretion deems unnecessary to the accomplishment of the preceding purposes, for the establishment and maintenance of a foundation to be known as the "Harry A. Haverlah Foundation", the principal purpose of which shall be the making of loans to deserving high school graduates who have completed their prescribed course with an average of "B" or better. It is my wish and I so provide that the Harry A. Haverlah Foundation shall be administered by a Board of Managers consisting of four members. Harry L. Brown shall be President of such Board of Managers and shall appoint the other three members thereof for the initial term of such Board membership. One member of the Board

of Managers shall be a president or vice president of a bank in Palestine, Texas. One member of the Board of Managers shall be an administrative officer of Palestine High School. One member of the Board of Managers shall be an administrative officer of some accredited college or university located in the State of Texas, or a professional or business man residing in Palestine, Texas. The Board of Managers shall meet at such times and places as is reasonably necessary to effectuate the screening of loan applicants and the granting of loans for those purposes for which the foundation is created. The loans contemplated by me in the creation and establishment of this foundation are to bear no interest until such time as the borrower shall have completed the course of education upon which he has chosen to engage or until he shall have abandoned any course so begun. It is my primary wish that the foundation extend its operation over as wide area as available funds will permit, however in that regard I direct that its function and extension of loans be confined to residents of Anderson County, Texas, until the Board of Managers, upon careful consideration, determines that its financial condition will permit its more wide-spread availability. If at any time the Harry A. Haverlah Foundation shall achieve a condition of financial solvency to such an extent that its available funds substantially exceed the needs of loan applicants, the Board of Managers may, after careful consideration, extend the beneficial purposes of such foundation to

other fields of benevolence, without reference to the earning of profit or the growth of foundation capital. Any buildings or other physical structures erected by the Board of Managers with trust funds, shall be erected and located in Palestine, Texas. The provisions of this sub-paragraph F of this will are general. I have for a long period of time entertained a desire to establish a foundation of the kind herein mentioned, essentially of a non-profit character and dedicated to education and benevolent purposes. At the time of my execution of this will, I plan and intend to proceed as soon as possible to the task of initiating the necessary proceedings to establish and create the foundation which I have in mind, whereupon I can and will with more clarity incorporate within the terms of a testamentary instrument the details of the management, conduct and policies of such foundation. I have at length discussed with my dear friend and business associate, Harry L. Brown, my general wishes with reference to the Harry A. Haverlah Foundation, and in the event my death should occur prior to the time such foundation shall have been legally organized, I direct that he, the said Harry L. Brown, either individually, as Independent Executor or as Trustee hereunder, either initiate or complete the necessary steps to establish and put into function the Harry A. Haverlah Foundation consistent with those of my wishes and views relating thereto which we have so often discussed; and in that regard, the said Harry L. Brown is authorized, empowered and

directed to dictate the principals, policies and procedures by which the Harry A. Haverlah Foundation is to be governed and perpetuated.

G. The Trustee, in addition to any and all other powers hereinabove specifically enumerated, and irrespective of any limitations of powers otherwise imposed thereon by the Texas Trust Act, is authorized to pledge or hypothecate all or any portion of the trust estate; to invest and re-invest the trust estate in bonds, stocks, notes secured by mortgages on real estate, real estate and improvements thereon, or in such other property real or personal as to said Trustee may appear to be in the best interests of the trust; and to improve, make additions to and expenditures on any and all real estate in the hands of the Trustee; and to engage in any business deemed advisable to the Trustee in his discretion as a general or special partner therein, and to incorporate any such business and hold the stock thereof as an investment, and to employ agents to manage and operate any such business; and to employ attorneys or other advisors incident thereto; and to borrow money and pledge any of the trust estate as security therefor, except when to do so would in reasonable probability impair the power of the Trustee to meet the payment of those benefits herein provided without the invasion of the corpus of the trust; and in each of such acts, the Trustee shall be charged only with the exercise of reasonable care.

H. The interests of Shirley Johnson, Gary Johnson, Cliff Johnson and Harry L. Brown, Jr. in the corpus or the income of the trust estate shall not be subject to assignment, alienation, pledge, attachment, or claims of creditors, and shall not otherwise be voluntarily alienated or encumbered by any such beneficiary.

I. I direct my Trustee to vote any stock belonging to the trust estate in H. L. Brown & Associates, Inc. or any successor corporation in such fashion as to undertake to cause the Board of Directors of H. L. Brown & Associates, Inc. or any successor corporation to consist of Harry L. Brown, a president or vice president of one of the banks in Palestine, Texas, and one business or professional man residing in Palestine, Texas; and it shall not be deemed improper that any one or more of the Directors of H. L. Brown & Associates, Inc. or any successory corporation shall also serve as Trustee hereunder or as a member of the Board of Managers of the Harry A. Haverlah Foundation.

VI.

In the event of the death of Harry L. Brown, or in the event of his inability or refusal to act as Executor or Trustee hereunder, I nominate, constitute and appoint the East Texas National Bank of Palestine, Texas, as Independent Executor of my estate and a successor Trustee hereunder, if the East Texas National Bank of Palestine, Texas is willing to accept such appoint-

ment as Trustee in light of the limitation of fees therefor hereinafter provided; and in the event the said East Texas National Bank of Palestine, Texas is unwilling to so serve, then and in such event I nominate, constitute and appoint any other bank in existence for at least fifteen years and having a combined capital and surplus of at least $500,000.00, preferably a bank in Palestine, Texas, as Trustee hereunder and as Independent Executor of my estate.

VII.

I am advised that it is reasonably likely that a corporate Executor or Trustee would accept the duties of Executor and Trustee with reference to my estate on a fee basis significantly less than that which would otherwise be permitted by law, and inasmuch as it is my paramount and primary desire that ultimately my estate will become the basis for an expanding service to educational aid and other benevolent purposes through the foundation hereinabove mentioned, I direct that any corporation Executor or Trustee administering my estate and this trust shall do so at a fee therefor not to exceed 3%, rather than what I understand to be a statutory 5% fee.

VIII.

I further authorize and empower my Executor to exercise all of the powers herein vested in the Trustee

during the period of administration upon my estate and prior to the time that my Trustee shall have qualified and accepted any of the properties passing to the Trustee under the terms of this will.

In witness Whereof, I have executed this instrument consisting of eighteen double spaced typewritten pages as my last will and testament at Palestine, Texas, this day of November, 1964.

We, the undersigned persons, of lawful age, have on this day, November 16, 1964, witnessed the signature of Harry A. Haverlah, to the foregoing will and testament in the presence of each other, and we have at the same time, and in his presence and in the presence of each other, subscribed our names hereto as attesting witnesses.

Witness

Witness

THE STATE OF TEXAS }
COUNTY OF ANDERSON }

BEFORE ME, the undersigned authority, on this day personally appeared Harry A. Haverlah, Lee Roy Mathis, Jr. and Bascom W. Bentley known to me to be the testator and the witnesses respectively, whose names are subscribed to the foregoing and annexed instrument in their respective capacities, and all of the said persons being by me duly sworn, and the said Harry A. Haverlah, testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament, and that he had willingly made and executed it as his free act and deed for the purposes therein expressed; and the said witnesses, each on his oath, stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is his last will and testament, and that he executed the same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the testator and at his request; that he at that time was nineteen years of age or over and was of sound mind; that each of said witnesses was then at least fourteen years of age.

Testator

Witness

Witness

Witness

Subscribed and acknowledged before me by the said Harry A. Haverlah, testator, and subscribed and sworn to before me by the said Lee Roy Mathis, Jr., M.D., and Bascom W. Bentley, M.D., witnesses, this 16th day of November, 1964.
(L.S.)

.....
Notary Public in and for
Anderson County, Texas

THE STATE OF TEXAS }
COUNTY OF ANDERSON }

I, STANLEY WALTON, Clerk of the County Court of Anderson County, State of Texas, the same being a court of record, and the lawful possessor and custodian of the papers and records of said Court, do hereby certify that the foregoing twenty (20) pages contain a true, full and complete copy of the Will of Harry A. Haverlah, dated November 16, 1964, filed in Cause No. 7360, styled "Estate of Harry A. Haverlah, Deceased" as the same appears of record in Volume 102, Page 271, Probate Minutes of Anderson County, Texas.

I further certify that said will was duly admitted to probate by an order entered of record December 21, 1964.

TO CERTIFY WHICH witness my hand and seal of office this the 12th day of May, 1967.

Stanley Walton, County Clerk,
Anderson County, Texas.
Deputy.

By _____

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-652

HARRY L. BROWN, EXECUTOR
ESTATE OF HARRY A. HAVERLAH, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on July 27, 1972 (Pet. App. B. 1-19). The petition, filed on October 27, 1972, is untimely, and since the time limitation is jurisdictional, the petition should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972

☆ U. S. Government Printing Office: 1972—488-699/306